



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

RIN 0985-AA16

45 CFR Part 1330

National Institute on Disability, Independent Living, and Rehabilitation Research

AGENCY: Administration for Community Living, Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: The Administration for Community Living (ACL) within the Department of Health and Human Services (HHS or the Department) is amending its regulations for the National Institute on Disability, Independent Living and Rehabilitation Research (NIDILRR). These minor amendments to NIDILRR's peer review criteria allow NIDILRR to better evaluate the extent to which our grant applicants conduct outreach to people with disabilities and people from other groups that traditionally have been underserved and underrepresented, as described in Executive Order 13985, and emphasize the need for research and development activities that apply appropriate engineering knowledge and techniques within NIDILRR's Rehabilitation Engineering Research Centers (RERC) program.

DATES: These final regulations are effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Statutory Authority

ACL publishes this final rule under the authority granted to the Director of the National Institute on Disability, Independent Living, and Rehabilitation Research (the Director), under 29 U.S.C. 762(f) to provide for scientific peer review of all applications for financial assistance for research, training, and demonstrations projects over which the Director has authority; and under 29 U.S.C. 764(b)(3) to establish and support Rehabilitation Engineering Research Centers (RERCs).

I. Background

The HHS regulation for NIDILRR programs was developed and finalized in 2016 following the transfer of NIDILRR to ACL and HHS from the Department of Education, as required by the Workforce Innovation and Opportunity Act (WIOA) of 2014. NIDILRR's mission is to generate new knowledge and to promote its effective use to improve the abilities of individuals with disabilities to perform activities of their choice in the community as well as to expand society's capacity to provide full opportunities and accommodations for individuals with disabilities. As the primary research enterprise within ACL, NIDILRR's mission is highly complementary to the overarching mission of ACL to maximize the independence, well-being, and health of older adults, people with disabilities across the lifespan, and their families and caregivers. NIDILRR programs address a wide range of disabilities and impairments across all age groups and promote health and function, community living and participation, and employment. To accomplish these goals, NIDILRR invests in research, knowledge translation, and capacity-building activities through its discretionary grant-funding authorities. This final rule provides minor but important updates to the NIDILRR rule at 45 CFR part 1330).

II. Provisions of the Proposed Regulations

The first update to 45 CFR part 1330 is directly responsive to Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 86 FR 7009 (Jan. 20, 2021) (EO). The purpose of the update is to enable NIDILRR to better evaluate, through the peer review of grant applications, the extent to which grant

applicants conduct outreach to people who are members of specific groups that have traditionally been underserved and underrepresented in research. *See* 86 FR 7009 (“The term ‘underserved communities’ refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, as exemplified by the list in the preceding definition of ‘equity.’”). The EO defines “equity” as “consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.” *Id.* Applicant refers to organizations such as universities or other organizations that apply for NIDILRR grants. NIDILRR’s current regulation regarding applicants’ proposed “Project Staff” (45 CFR 1330.24(n)) combines a significant number of underrepresented groups into one list (“...based on race, color, national origin, gender, age, or disability”), and asks reviewers to broadly evaluate the extent to which the grant applicant encourages applications for employment from people who are members of those groups in the list. This format does not allow reviewers to evaluate applicants’ outreach and hiring practices for people with disabilities, or for other underserved and underrepresented populations highlighted in the list, as distinct groups.

To better promote applicants’ hiring of people with disabilities, and people from other underserved communities – we proposed to revise 45 CFR 1330.24(n) to disaggregate these populations into two distinct peer review subcriteria. Disaggregation of people with disabilities and people from other underserved communities into separate subcriteria allows peer reviewers to more directly evaluate and score the extent to which grant applicants encourage applications for employment from people in each of these distinct groups. ACL also proposes a conforming amendment to 45 CFR 1330.23(b) reflecting this revision to the selection criteria. As a result of these changes, applicants will be required to describe their outreach practices with respect to

people with disabilities and other specific groups, separately and distinctly. ACL intends for grant applicants to provide quantitative and/or qualitative information regarding these disaggregated groups in the narrative of their proposal, and for peer reviewers to accordingly use this information to evaluate and score each individual application.

The second update to 45 CFR part 1330 is intended to better emphasize the need for engineering research and development (R&D) activities in NIDILRR's RERC program funding opportunities. The update would add sub-criteria under both the "Design of Research Activities" (45 CFR 1330.24(c)) and "Design of Development Activities" (45 CFR 1330.24(d)) to allow reviewers to evaluate the extent to which applicants are proposing engineering knowledge and methods that are appropriate to the research questions and development aims described in their RERC applications. The absence of such engineering-focused criteria have led to some RERC grants that are not optimally using engineering R&D methods as envisioned in the statutory language that authorizes and names the RERC program. See 29 U.S.C. 764(b)(3).

III. Analysis of Responses to Public Comments

We received fourteen public comments from six individuals, five stakeholder associations, and three university departments. We have reviewed all of the public comments received and considered the concerns raised by all stakeholders. As a result, we have made revisions to the proposed regulations at 45 CFR 1330.24. Specifically, we have modified 45 CFR 1330.24(c), (d), and (n). See Section IV "Provisions of the Final Regulations" for detailed description of these changes. A summary of the comments received and our responses to those comments appear in the paragraphs below.

Comment: Five parties provided comments that were fully supportive of the proposed revisions to NIDILRR's menu of peer review criteria. Two of these parties particularly appreciated NIDILRR's continued inclusion of people who are underrepresented in research professions based on age.

Response: We thank these commenters for their support.

Comment: One commenter suggested that the evaluation of the extent to which applicant organizations encourage applications from and hire people with disabilities and people from other underrepresented communities is “more appropriately evaluated by the government”, than by the peer review process. The commenter suggests that instead of evaluating these factors as part of the peer review process, ACL and NIDILRR should use documented histories of applicant compliance or noncompliance with the Americans with Disabilities Act and other civil rights laws and regulations, as a determinant of eligibility for Federal funding.

Response: NIDILRR and other ACL and HHS grant opportunities have strong non-discrimination requirements for applicants, and NIDILRR grants are issued with detailed Terms and Conditions related to compliance with government-wide non-discrimination laws and regulations, including the Americans with Disabilities Act, and the Rehabilitation Act. ACL and NIDILRR will maintain these important compliance requirements and continue to evolve and implement policies that promote accessibility as a requirement for Federal funding. However, compliance with broad non-discrimination laws is not the same as purposefully encouraging applications for employment from people with disabilities and people from other underrepresented and underserved communities. NIDILRR and the field of disability research has a strong and direct interest in, and will benefit significantly from, growth in the representation of people with disabilities and investigators from underserved communities. This interest is reflected in our long-standing peer review sub-criterion about the extent to which grant applicants encourage applications for employment from people with disabilities and people from other underrepresented and underserved communities. By disaggregating this sub-criterion, consistent with Executive Order 13985, we aim to evaluate the extent to which applicant organizations are encouraging applications for employment from people with disabilities and people from other underrepresented and underserved communities.

Comment: One commenter noted that NIDILRR’s proposed disaggregated Project Staff subcriteria will appropriately promote consideration of the extent to which applicant

organizations recruit people with disabilities. This commenter suggested that NIDILRR provide further specificity in the disability sub-criterion, in a way that would further value the recruitment of people with disabilities who have the greatest support needs. The commenter suggested that NIDILRR provide a scoring rubric for this disability sub-criterion, which would potentially provide more points for applicant organizations that demonstrate efforts to recruit and hire people with disabilities who have the greatest support needs.

Response: NIDILRR agrees with the commenter that people with disabilities vary in their level of disability and support needs. NIDILRR's programs are authorized by the Rehabilitation Act of 1973, as amended. The Rehabilitation Act consistently emphasizes that the programs that it authorizes, including NIDILRR, must benefit people with disabilities – especially people with the most significant disabilities (29 U.S.C. 764(a)(1)). To reflect this foundational emphasis in our authorizing statute, NIDILRR is modifying the proposed sub-criterion to state that people with disabilities may include, but are not limited to, people with disabilities who have the greatest support needs.

While NIDILRR does not provide scoring rubrics with its scoring criteria and subcriteria in 45 CFR 1330(n), by including this clarification in the sub-criterion we specifically allow grant applicants to describe, and reviewers to evaluate the extent to which applicant organizations encourage applications from people with disabilities who have the greatest support needs.

Comment: One commenter noted concern that grant applicant organizations may be evaluated not just on their commitment to increasing representation of people with disabilities or people from other underrepresented communities in their organizations, but on the data that they can provide as evidence of recruitment and hiring. The commenter noted that individual researchers may not be able to influence their organizations' recruitment and hiring practices, and therefore may be penalized because of the practices of their organizations.

Response: ACL, NIDILRR, and most other Federal grants are made to organizations, and not directly to individual researchers. As such, our criteria purposefully address the plans, actions, and resources of applicant organizations, and not of individual investigators. The commenter is correct that NIDILRR aims to evaluate not just the applicant organization's commitment to recruitment of people with disabilities or people from other underrepresented communities, but the actions they have taken to encourage applications for employment from people with disabilities and people from other underrepresented groups. It is up to applicant organizations to determine how they will address this sub-criterion, and they may provide qualitative or quantitative data in doing so.

Comment: Three commenters noted that it will be difficult for an applicant to provide evidence of hiring people with disabilities or people from underrepresented communities. One of these commenters noted that organizations' collection of this information from their employees is typically voluntary, and therefore likely unreliable. Two of these commenters cautioned that the revised subcriteria may place pressure on researchers and their teams to disclose disabilities or to disclose demographic characteristics that they wish to remain private. Two of the commenters suggested that NIDILRR provide clarification to peer reviewers on ways to address these subcriteria while recognizing applicant institutions' policies that do not require disclosure of disability or other demographic characteristics.

Response: Based upon these comments, our final rule will not include language that focuses on applicants' hiring practices. The final rule will, as proposed, disaggregate people with disabilities from other underserved populations in 45 CFR 1330(n), and will continue to focus on the extent to which applicants encourage applications for employment from people with disabilities and other underrepresented groups.

ACL intends for grant applicants to respond to our disaggregated subcriteria with qualitative or quantitative information, or both, in the narrative of their proposal. Peer reviewers

will use this information to evaluate and score each individual application. As revised for this final rule, nothing in the proposed subcriteria language compels applicants to provide quantitative data that would require applicants or their potential employees to disclose disability or other individual characteristics.

NIDILRR intentionally does not further interpret these review criteria that come from our program regulations or provide guidance to applicants or reviewers on the application of any of the criteria. We rely on individual reviewers to consistently apply these and other criteria for each of the grant applications they are reviewing. This approach to peer review, which is commonly used and accepted within the scientific community, allows reviewers with different perspectives and areas of expertise to participate meaningfully in the peer review process.

Comment: Five commenters supported the addition of proposed engineering specifications to the research and development subcriteria. These commenters, however, suggested that ACL and NIDILRR further specify and define engineering as part of the subcriteria, and offered a variety of suggestions for further definition.

Response: NIDILRR has considered this feedback, in the context of the “Design of Research Activities” and “Design of Development Activities” subcriteria that our proposed additions would fit within, under 45 CFR 1330.24(c) and 45 CFR 1330.24(d). Within those subcriteria, there are many terms that NIDILRR could define in much greater detail, but purposefully does not. For instance, under “Design of Research Activities,” there is a sub-criterion about the extent to which the data analysis methods are appropriate. Instead of further delineating the wide variety of data analysis methods that could be proposed by applicants and evaluated by reviewers, we leave the application of this broad sub-criterion to the applicants and reviewers. The evaluation of the broad sub-criterion about the appropriateness of data analysis methods is only possible within the context of the grant application for which it is being evaluated. For some applications, it is appropriate for applicants to propose qualitative analysis

of in-depth interview data. For other applications, it is appropriate for applicants to propose statistical analysis of highly quantitative data – depending on the applicant’s aims and research questions. We do not define each of the innumerable potential data analysis methods that applicants could propose.

The same logic and approach apply under our proposed subcriteria related to engineering. As noted by the commenters, there are a wide range of engineering specialties and approaches that we could further define, including but not limited to biomedical engineering, electrical engineering, mechanical engineering, and software development and computer science. NIDILRR’s intent, however, is for reviewers to evaluate the extent to which RERC applicants are applying engineering knowledge and techniques that are appropriate to address the aims and objectives of the proposed RERC grant.

To better reflect this specific intent, NIDILRR is modifying our two proposed subcriteria by adding “appropriate” prior to the word engineering.

Comment: NIDILRR received a number of comments that were not directly related to the proposed rule. These comments focused on topics including NIDILRR’s peer review processes and policies, the availability of researchers with disabilities in the labor market, funding for accommodations used by employees with disabilities, and the importance of research on the needs, experiences, and outcomes of people with communication disabilities.

Response: All of these are important topics, and we look forward to engaging with NIDILRR stakeholders on these topics.

IV. Provisions of the Final Regulations

In this final rule, we are adopting the provisions in the January 10 proposed rule, with the following changes:

- Revised proposed 45 CFR 1330.24(c)(5) to add “appropriate” prior to the word engineering.

- Revised proposed 45 CFR 1330.24(d)(4) to add “appropriate” prior to the word engineering.
- Revised proposed 45 CFR 1330.24(n)(1) to specify that people with disabilities may include, but are not limited to, people with disabilities who have the greatest support needs.
- Revised proposed 45 CFR 1330.24(n)(1) to delete “and hires.”
- Revised proposed 45 CFR 1330.24(n)(2) to delete “and hires.”
- Revised proposed 45 CFR 1330.24(n)(2) to add “other.”

V. Required Regulatory Analyses

A. Executive Orders 12866 and 13563

EO 12866, “Regulatory Planning and Review,” and EO 13563, “Improving Regulation and Regulatory Review,” direct agencies to assess all costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select regulatory approaches that maximize net benefits.

OMB determined that the rulemaking was not an economically significant regulatory action under these EOs. The preambles to this rule maintained that it primarily described procedural changes that would require Department expenditures to implement.

B. Regulatory Flexibility Act

The Department has examined the economic implications of this final rule as required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* The RFA requires an agency to describe the impact of a final rulemaking on small entities by providing an initial regulatory flexibility analysis, unless the agency determines that the final rule will not have a significant economic impact on a substantial number of small entities, provides a factual basis for this determination, and certifies the statement. 5 U.S.C. 603(a) and 605(b). The Department considers a proposed or final rule to have a significant economic impact on a substantial number of small entities if it has at least a three percent impact on revenue of at least five percent of small entities.

The Department has determined, and the Secretary certifies, that this final rule would not have a significant economic impact on the operations of a substantial number of small entities.

C. Executive Order 13132 (Federalism)

EO 13132, Federalism, 64 FR 43255 (Aug. 4, 1999) establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on state and local governments or has federalism implications. The Department has determined that this final rule would not impose such costs or have any federalism implications.

D. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

HHS has analyzed this final rule in accordance with the principles set forth in EO 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (Nov. 6, 2000). HHS has determined that the final rule does not contain policies that would have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. In accordance with the Department's Tribal consultation policy, the Department solicited comments from tribal officials on any potential impact on Indian Tribes prior to promulgating this final rule.

E. National Environmental Policy Act

HHS had determined that this final rule would not have a significant impact on the environment.

F. Paperwork Reduction Act of 1995

In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, 44 U.S.C. 3501–3521; 5 CFR part 1320, appendix A.1, the Department has reviewed this final rule and has determined that it does not establish new collections of information.

Alison Barkoff, Acting Administrator Administration for Community Living approved this document on July 13, 2022.

List of Subjects in 45 CFR Part 1330

Disability, Grant programs, Research

Accordingly, ACL amends 45 CFR part 1330 as follows:

PART 1330—NATIONAL INSTITUTE FOR DISABILITY, INDEPENDENT LIVING, AND REHABILITATION RESEARCH

1. The authority citation for part 1330 continues to read as follows:

Authority: 29 U.S.C. 709, 3343.

2. Amend § 1330.23 by revising paragraph (b) to read as follows:

§ 1330.23 Evaluation process.

* * * * *

(b) In considering selection criteria in § 1330.24, the Director selects one or more of the factors listed in the criteria, but always considers the factors in § 1330.24(n) regarding people with disabilities, and members of groups that have traditionally been underrepresented based on race, ethnicity, national origin, sex (including sexual orientation and gender identity), or age.

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3. Amend § 1330.24 by adding paragraphs (c)(5) and (d)(4) and revising paragraph (n) to read as follows:

§ 1330.24 Selection criteria.

* * * * *

(c) * * *

(5) The extent to which research activities use appropriate engineering knowledge and techniques to collect, analyze, or synthesize research data.

(d) * * *

(4) The extent to which development activities apply appropriate engineering knowledge and techniques to achieve development objectives.

* * * * *

(n) *Project staff.* In determining the quality of the applicant's project staff, the Director considers one or more of the following factors:

(1) The extent to which the applicant encourages applications for employment from people with disabilities, who may include but are not limited to people with disabilities who have the greatest support needs.

(2) The extent to which the applicant encourages applications for employment from people who are members of other groups that have traditionally been underrepresented in research professions based on race, ethnicity, national origin, sex (including sexual orientation and gender identity), or age.

(3) The extent to which the key personnel and other key staff have appropriate training and experience in disciplines required to conduct all proposed activities.

(4) The extent to which the commitment of staff time is adequate to accomplish all the proposed activities of the project.

(5) The extent to which the key personnel are knowledgeable about the methodology and literature of pertinent subject areas.

(6) The extent to which the project staff includes outstanding scientists in the field.

(7) The extent to which key personnel have up-to-date knowledge from research or effective practice in the subject area covered in the priority.

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Dated: August 9, 2022.

Xavier Becerra,
Secretary,
Department of Health and Human Services.